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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____.

NICOLAE DRAGAN, et al.,

Petitioners,

-vs-

JOHN and SYLVIA MILLER,

Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

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QUESTION PRESENTED

Whether a federal diversity court has jurisdiction to entertain an independent action in tort for the wrongful interference with an inheritance, cognizable under the law of the State, where the probate proceedings have been terminated and the alleged wrongdoer has obtained the property comprising the claimed inheritance through a duly probated will?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Nicolae Dragan, Liviu Dragan, Doina Moeter, Ana Dragan, Silvia Dragan, Florin Dragan, Ana Dragan, and the respondents.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

NICOLAE DRAGAN, et al.,

Petitioners,

vs.

JOHN W. MILLER and SYLVIA MILLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioners, Nicolae Dragan, Liviu Dragan, Doina Moeter, Ana Dragan, Silvia Dragan, Florin Dragan and Ana Dragan, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Seventh Circuit entered in this proceeding on June 4, 1982.

OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Report and Recommendation of the Magistrate, and the Orders of the District Court for the Northern District of Illinois, Western Division, are attached hereto in the Appendix.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 4, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

1. Section 1332, Diversity of citizenship.

(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between --

(b) citizens of a State, and foreign states or citizens or subjects thereof;

2. Section 8-1, Illinois Probate Act of 1975, Ill. Rev. Stst. Ch. 110½. See infra, page 5.

STATEMENT OF THE CASE.

The District Court dismissed the Petitioners' diversity complaint for lack of subject matter jurisdiction. The Court of Appeals affirmed the dismissal.

The complaint alleges that the Petitioners are citizens and residents of Romania and the sole heirs at law of Walter Dragan who died testate, leaving his entire estate to John W. Miller and Sylvania Cibu Miller, residents of Illinois, Respondents herein; that the Respondents, who are unrelated to the decedent, improperly importuned and wrongfully influenced the decedent when he was ill and enfeebled, to disinherit the Petitioners. It is further alleged that but for the wrongful actions and conduct of the Respondents, the Petitioners would have succeeded to the property and estate of the decedent as the natural objects of the decedent's bounty.

The Petitioners request that a trust

be imposed by the Court upon the properties obtained by the Respondents as a result of their wrongful acts, and that the Respondents be declared trustees thereof for the benefit of the Petitioners. In addition, the Petitioners seek punitive damages and the allowance of attorney fees for the prosecution of the action.

The District Court found that the Petitioners are improperly seeking to relitigate a will contest action in the federal court. The Seventh Circuit recognized the action as being "a tort for wrongful interference with an expectancy in a decedent's estate", cognizable under Illinois law; it held nevertheless that the "tort action must be brought as an ancillary proceeding, under Section 8-1 of the Illinois Probate Act to the original proceeding." Section 8-1 of the Probate Act of 1975, as pertinent to this case, provides:

"Within 6 months after the admission

to probate of a domestic or foreign will in any court of this State, any interested person may file a petition in the proceeding for the administration of the testate's estate to contest the validity of the will." (Ill. Rev. Stat. 1977, Ch. 110½, par. 8-1).

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Has Misconstrued and Misapplied the Decisions of this Court Concerning Diversity Jurisdiction of the Federal Courts in Suits Inter Partes Relating to a Decedent's Estate.

This court has held that the exercise of jurisdiction over property by one court does not prevent other courts from rendering any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property. Sutton v. English, 246 U.S. 199 (1918), Gaines v. Fuentes, 92 U.S. 10. This principle was applied in Markham v. Allen, 326 U.S. 490 (1946), where the Court

sustained federal jurisdiction on the ground that the judgment did not interfere with the "orderly administration of the decedent's estate in the state probate court" but simply involved the Alien Property Custodian's right in the property to be distributed.

2. The Decision Below Raises Significant and Recurring Problems Concerning Efforts to Invoke the Diversity Jurisdiction in the Area of Probate and Decedent's Estates.

After stating that the probate exception to diversity jurisdiction "is one of the most mysterious and esoteric branches of the law of federal jurisdiction", the Seventh Circuit chose to sidestep a direct confrontation with the issue in the circumstances of this case and, instead, sought justification for its conclusion in a lateral manner. Although the Circuit Court conceded that Illinois recognizes a tort

for wrongful interference with an expectancy in a decedent's estate, it determined nevertheless that the Petitioner's tort action must be brought in the state probate court as an ancillary proceeding, under Section 8-1 of the Probate Act, to the original proceedings in probate. Somehow the court was impelled to the conclusion that the Petitioner's action is, in reality, a will contest suit brought under the guise of a tort action. In the final analysis, the Seventh Circuit agreed with the findings of the Magistrate, ratified by the district judge, that the complaint is, in effect, an action to contest the validity of a will, which is within the exclusive province of the probate court of Illinois. Just how the Petitioner's tort action had been transformed into a "pure" probate proceeding is unexplained.

The area of probate and decedent's estates continues to present a divergence

of views among the district and circuit courts on the question of subject matter jurisdiction. Though federal courts choose not to exercise their jurisdiction in this area for numerous reasons, there are certain guiding principles which have emerged and are being considered to aid the court in determining whether to entertain or decline jurisdiction. One is the principle that federal courts do not have the power to probate wills, or to interfere with or impede probate proceedings, or to assume general jurisdiction of the probate or control of property in the custody of the state probate court. Once a diversity suit can be characterized as involving "pure" probate matters, the desire of federal courts is to avoid interference with state probate proceedings. A standard used by the courts to determine federal jurisdiction is whether under state law the dispute would be cognizable only by the

probate court. If so, the parties will be relegated to that court; however, where the suit merely seeks to enforce a claim inter partes, enforceable in a state court of general jurisdiction, federal jurisdiction will be assumed. Lamberg v. Callahan, 455 F.2d 1213, 1216 (2d Cir., 1972); Bassler v. Arrowood, 500 F.2d 138 (8th Cir. 1974). This approach was recognized by the Seventh Circuit.

On May 18, 1982, the Seventh Circuit decided the case of Susan Kemper Hamilton v. Arthur C. Nielsen, Jr., and American National Bank and Trust Co., unreported, being case number 81-1935. A beneficiary of a testamentary trust sued the executor for mismanagement of estate funds. The Seventh Circuit sustained diversity jurisdiction, having found that the action was not one in which the district court would interfere with or impede the probate proceedings. The Court noted that under Illi-

nois law, the probate division and the law division are simply divisions of the same constitutional court of general jurisdiction, and that both courts have equal and concurrent jurisdiction over the appointment ofan administrator. The Court below declared, significant to the issue herein, that ". . . so long as the federal court is faithfully applying Illinois law its decision will not have a systematically different effect than if the action had been brougnt in the corresponding state court of general jurisdiction." Illinois is one of many states which have abolished separate probate courts and vested the probate jurisdiction in its courts of general jurisdiction. See Ill. Const. Art. 6, Sec. 9; Alfaro v. Meagher, 27 Ill. App. 3d 292, 295-6, 326 N.E.2d 545, 548 (1975).

It is clear that "the exception from the diversity jurisdiction as to probate matters is far from absolute." C. Wright,

Handbook of the Law of Federal Courts, Section 25, at page 98, (3rd Ed. 1976). Some federal courts decline jurisdiction upon the mere mention of the word "probate". Miami County National Bank v. Bancroft, 121 F.2d 921 (10th Cir. 1941). Other construe the meaning of probate quite narrowly to limit the scope of the exception. Griffith v. Bank of New York, 147 F.2d 899 (2nd Cir. 1945); Phillips, Nizer, Benjamin, Krem & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973); Akin v. Louisiana National Bank of Baton Rouge, 322 F.2d 749, 751 (5th Cir. 1963).

Admittedly, a federal court generally has no power to set aside the probate of a will since probate courts have exclusive jurisdiction over wills. But, sitting in equity, the federal court may create a constructive trust in the property obtained as a result of the probate of the will, and require the defendants, as constructive

trustees, to account for and to transfer the property received under the probate decree to the petitioners, if the court finds they are entitled to it. Thus, federal courts under diversity jurisdiction do have subject matter jurisdiction over suits that arise out of or pertain to probate proceedings. The generally accepted view illustrating this principle was enunciated by the Fifth Circuit in Dewitt v. Duce, 599 F.2d 676 (1979). The court there held:

> "Complaint, which alleged that defendants improperly, systematically fraudulently acted to influence testator to revoke will naming plaintiffs as substantial beneficiaries and to execute instead a new will for defendants' benefit, and which was not in place of challenge to probate but rather encompassed independent tort claim for intentional interference with inheritance, was sufficient on its face to confer subject matter jurisdiction under Florida law, which recognizes independent cause of action based upon such a claim."

Especially persuasive and pertinent to our issue herein is the Fifth Circuit's

statement:

> "Although the complaint does not so state, Arthur Welch's will has probably completed Florida proceedings, so the district court's entertainment of this action will not interfere with Florida's orderly administration of the estate of its decedents. We reject the defendants' contention that this is a mere will contest." (underscoring ours)

Petitioners seek the imposition of a constructive trust based upon the wrongful actions of the respondents in eliminating them as the lawful successors to the property of their ancestor. As we have seen, Illinois recognizes an independent action in tort for the intentional interference with an inheritance. The Restatement of Torts (Second), Section 774 (1979), defines the tort as follows:

> "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."

It is evident, we believe, that the statutory right to challenge the validity of a will by an action in the probate proceedings of a decedent's estate does not preclude the Petitioner from pursuing an in personam remedy against the respondents. The Petitioners may institute an independent action in tort for damages, or an action in equity to impress a trust (constructive trust) in any court of competent jurisdiction. The Restatement of the Law of Judgments, American Law Institute, states the applicable rule as follows: (Section 114)

> "Probate. Although a court of equity normally has no power to set aside the probate of a will since probate courts usually have exclusive jurisdiction over wills, equitable relief may be granted against the effect of a probate decree, even though probate decrees are made conclusive by statute . Thus a court of equity may create a constructive trust in property obtained as the result of the probate of the will; it may require the constructive trustee to deliver such property

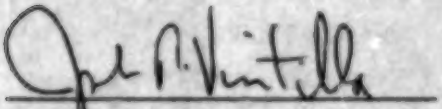
> or account for its proceeds. Likewise, a court of equity may require an administrator to account for property for which he previously obtained a discharge in the probate court; and it may order persons who have received property under a probate decree to transfer it to others who, the court of equity finds, are entitled to it."

We believe the time has come for this Court to enunciate a clear and definitive ruling on the subject matter of diversity jurisdiction in the area of probate and decedents' estates. The judge-made probate exception to federal diversity jurisdiction needs attention and resolution by this Court.

Finally, the correctness of the decision below is open to serious question.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,



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